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12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 v.
18 \$209,815 IN UNITED STATES CURRENCY,
19 Defendant.

20
21 JULIO FIGUEROA,
22 Claimant.

23
24 CLAIMANT'S MOTION FOR
25 CERTIFICATION OF ORDER FOR
26 INTERLOCUTORY APPEAL PURSUANT
27 TO 28 U.S.C. § 1292(b) and TO STAY
28 CLAIMANT'S OBLIGATION TO
PROVIDE FURTHER RESPONSES
PENDING DETERMINATION;
MEMORANDUM OF LAW.

/ Date: February 6, 2015
Times: 10:00a.m.
Courtroom 1 - 17th Floor

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1 compelling even further interrogatory responses. Claimant also moves this Court to stay
 2 Claimant's obligation to respond further to the special interrogatories until after the Court
 3 resolves this motion and any interlocutory appeal is decided.

4 The grounds for this motion are that there are substantial grounds for difference of
 5 opinion as to whether a civil forfeiture claimant must provide responses to further special
 6 interrogatories about a defendant property that was seized from him when the claimant has
 7 already established standing with his verified claim of ownership, his prior responses to special
 8 interrogatories that establish his identity and relationship to the defendant property, and the fact
 9 that the defendant property was seized from his possession. An immediate appeal from this
 10 Court's Order is the only way this important issue will be resolved where Claimant can avoid
 11 giving up a substantial right without having to defy a court order.

12 Further, there is no prejudice to the government since it will be able to obtain the
 13 information in regular discovery following the Case Management Conference, now scheduled for
 14 6 February 2015, at 10:00 a.m., where **both parties** will be able to then engage in mutual
 15 discovery, rather than the one-sided discovery now sought by the government only related to the
 16 issue of standing.

17 Respectfully Submitted,

18 Dated: 19 December 2014

19 *s/Edward M. Burch*
 20 DAVID M. MICHAEL
 21 EDWARD M. BURCH
 22 Attorneys for Claimant Julio Figueroa

23 **MEMORANDUM OF LAW**

24 Claimant respectfully but firmly believes that this Court's orders erroneously compelled
 25 further responses to special interrogatories in this case where Claimant undeniably established
 26 standing with his verified claim of ownership, his initial responses to the government's unilateral
 27 special interrogatories, the undisputed facts in this case, and this Court's unambiguous ruling on
 28 that very issue. The relevant cases, *U.S. v. \$133,420*, 672 F.3d 629, 643 (9th Cir. 2012), *U.S. v.*

1 \$999,830.00 (*Simard - Claimant*), 704 F. 3d 1042, 1043 (9th Cir. 2012), and *United States v.*
 2 \$154,853.00 in *United States Currency*, 744 F.3d 559, 563-564 (8th Cir. 2014), read together are
 3 harmonized easily and conclusively support Figueroa's view.

4 Absent interlocutory review by the Ninth Circuit, which can only be accomplished with
 5 this Court's certification or by Claimant electing to defy this Court's order, this important issue
 6 will remain unresolved and the government will continue to use and abuse with impunity the
 7 limited Rule G(6) special interrogatories to bully claimants into unnecessary discovery battles
 8 over the merits of the case, before the claimant can even propound a single discovery request
 9 himself or even enter the courthouse doors.

10 **I. RELEVANT FACTS**

11 The relevant undisputed facts here are now well-known to this Court: federal law
 12 enforcement agents stopped Claimant Julio Figueroa after he arrived on a flight at the San
 13 Francisco International airport and attempted to exit the airport; agents eventually seized the
 14 Defendant property from Figueroa's personal luggage and retained it for forfeiture proceedings.

15 The government eventually filed this forfeiture action against the Defendant property and
 16 Figueroa filed a claim opposing forfeiture in which he claimed to own all of the property. The
 17 government then served special limited interrogatories invoking Rule G(6) of the Supplemental
 18 Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (which allows only
 19 interrogatories "limited to the claimant's identity and relationship to the defendant property ..." to
 20 "permit the government [] to gather information that bears on the claimant's standing")¹, and
 21 Figueroa responded, providing his personal identifying information and confirming again that he
 22 owned all of the property and that it was seized from him, and additionally objecting on the
 23 grounds that the interrogatories exceeded the scope and purpose of Rule G(6).

24 This Court, although already ruling that Figueroa does, in fact, have standing, disagrees
 25 that no further special interrogatories can be propounded, and has now twice ordered Figueroa to
 26 provide more and more discovery, all at a time when Figueroa is not permitted to take his own

27
 28 ¹ See Advisory Committee Note to Rule G(6).

1 discovery and when there is no serious doubt that Figueroa has case-or-controversy standing to
 2 contest the seizure of his money that was taken directly from him by the government's agents
 3 here.

4 This motion to certify for appeal the Order compelling further responses from Figueroa
 5 follows.

6 **II. ARGUMENT**

7 An interlocutory appeal in a civil case such as the present is warranted when a controlling
 8 question of law, to which a substantial ground for difference of opinion exists, may ultimately
 9 advance the termination of the litigation. 28 U.S.C. § 1292 (b) reads in its entirety:

10 (b) When a district judge, in making in a civil action an order not otherwise
 11 appealable under this section, shall be of the opinion that such order involves a
controlling question of law as to which there is substantial ground for difference
of opinion and that an immediate appeal from the order may materially advance
the ultimate termination of the litigation, he shall so state in writing in such order.
 12 The Court of Appeals which would have jurisdiction of an appeal of such action
 13 may thereupon, in its discretion, permit an appeal to be taken from such order, if
 14 application is made to it within ten days after the entry of the order: Provided,
 15 however, That application for an appeal hereunder shall not stay proceedings in
 16 the district court unless the district judge or the Court of Appeals or a judge
 thereof shall so order.

17
 18 (emphases added.)

19 As to a “controlling question of law” issue, the “legislative history of subsection (b) of
 20 section 1292 . . . ” indicates that the section was to be used “ . . . where decision of an
 21 interlocutory appeal might avoid protracted and expensive litigation.” *United States Rubber Co.*
 22 *v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). *See also United States ex rel. Hollander v. Clay*,
 23 420 F. Supp. 853, 859 (D.D.C. 1976). Said another way, a question of law is “controlling” under
 24 § 1292 “if interlocutory reversal would [] at least conserve time for the lower court or time and
 25 expense for the parties.” *See e.g. Scoggin v. Weinman (In re Adam Aircraft Indus.)*, 2010 U.S.
 26 Dist. LEXIS 24461 (D. Colo. Feb. 23, 2010) (emphases added) (citing *Cook v. Rockwell Int'l*
 27 *Corp.*, 564 F.Supp.2d 1189, 1215 n.17 (D. Colo. 2008) and 16 Charles A. Wright et al., *Federal*
 28 *Practice and Procedure* § 3930 (2d ed. 1996)).

1 Thus, the “resolution of an issue need not necessarily terminate an action in order to be
 2 ‘controlling[.]’” *See e.g. Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 23-24 (2d Cir. 1990);
 3 *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 468 (S.D.N.Y. 2006), affirmed in
 4 relevant part at *Kiobel v. Royal Dutch Petroleum Co.*, 2010 U.S. App. LEXIS 19382 (2d Cir.
 5 Sept. 17, 2010.)

6 Also important here, a question of law “is controlling only if it may contribute to the
 7 determination, at an early stage, of a wide spectrum of cases.” *See Federal Deposit Ins. Corp. v.*
 8 *First Nat'l Bank*, 604 F. Supp. 616, 620 (E.D. Wis. 1985) (citing *Kohn v. Royall, Koegel &*

9 *Wells*, 59 F.R.D. 515, 525 (S.D.N.Y. 1973), appeal dismissed, 496 F.2d 1094 (2d Cir. 1974).

10 To say that federal asset forfeiture is widespread would be a gross understatement. 2009
 11 was “the fourth year since inception of the [federal forfeiture] Fund that it has exceeded \$1
 12 billion in deposits.” *See USDOJ Assets Forfeiture Fund and Seized Asset Deposit Fund Annual*
 13 *Financial Statement Fiscal Year 2009*, Report No. 10-10 (1/10) at p. 11². The Justice
 14 Department’s forfeiture fund (which does not include forfeitures from customs agents) ballooned
 15 to \$3.1 billion in 2008, and in 2009 was at nearly \$4 billion in assets. *Id.* at p. 31. This Court can
 16 only guess as to what the fund will end up being in 2014.

17 And, as the government has demonstrated here, it routinely³ uses the limited discovery
 18 device of Rule G(6) (which is intended to mostly personally identify the claimant, distinguish his
 19 ownership or possessory interest, and, if possessory, to parse out standing issues when such are
 20 genuinely in question) as a way to strike legitimate claimants from the case at the earliest
 21 possible stage in order to obtain forfeiture by a disfavored default judgment and avoid having to
 22 prove the merits of its case. At best, like here, such attacks waste limited resources and time of

24
 25 ² Viewed at http://www.justice.gov/jmd/afp/01programaudit/fy2009/fy2009_afs_report.pdf

26 ³ Recognizing this Court’s earlier admonishment, it would not be appropriate to reference this
 27 claim by further citations. Nonetheless, the earlier pleadings and cases cited disclose perfect
 28 examples of the government’s widespread practice of conflating standing inquiries with merits
 inquiries to set up motions to strike victims of federal law enforcement property seizures, all
 while claimants must stand helplessly by.

1 claimants, their counsel, and district courts and abuse a law that was designed to be more
 2 favorable to claimants, rather than more punitive.

3 To the extent that § 1292(b)'s "advance the ultimate termination of the litigation"
 4 requirement has been considered a distinct and separate prong of the statute, it has been said to
 5 "properly turn[] on pragmatic considerations." *See Federal Deposit Ins. Corp. v. First Nat'l*
 6 *Bank*, 604 F. Supp. 616, 620 (E.D. Wis. 1985) (citing *SCM Corporation v. Xerox Corporation*,
 7 474 F. Supp. 589, 593 (D. Conn. 1979)).

8 In *Rollins v. Dignity Health*, 2014 U.S. Dist. LEXIS 165531, 6 (N.D. Cal. Nov. 26,
 9 2014), this Court recently granted a motion to certify an issue for interlocutory appeal, reasoning:
 10 that there was "no[] dispute that the question to be certified is a controlling question of law in
 11 this case [where] Plaintiff has used the Court's Order as the basis for motions for a permanent
 12 injunction and for class certification, charting the litigation's current trajectory." Similarly here,
 13 the government has used this Court's order compelling discovery as a basis to strike Figueroa
 14 from the case and avoid proving the merits of its case. *Rollins* went on to reason that
 15 interlocutory appeal was appropriate because "the attendant costs of discovery, will vary
 16 significantly depending on the resolution of this issue" (Id. **7-8) and the costs that would be
 17 avoided if the Court of Appeals ruled favorably for defendant would be significant. ("These costs
 18 could be avoided, perhaps entirely, by a reversal at the Court of Appeals.") *Id.*

19 While the additional costs for Figueroa to provide further responses would not be as high
 20 as the defendant in *Rollins*, the costs that could and would be avoided for countless future
 21 claimants in this Ninth Circuit make a compelling case for interlocutory appeal. The Ninth
 22 Circuit's following of the Eighth Circuit and resolving this issue in Figueroa's favor will thus
 23 certainly "contribute to the determination, at an early stage, of a wide spectrum of cases." *See*
 24 *Federal Deposit Ins.*, *supra* 604 F. Supp. 616, 620. Furthermore, there is absolutely no prejudice
 25 to the government, since they will be entitled to the discovery they ask via regular discovery
 26 following the Case Management Conference, on 6 February 2014, at which time both parties, on
 27 an equal basis, will be able to go forward with general discovery and pretrial motions. In other
 28 words, the only result from resolving this issue with an interlocutory appeal will be that the

1 government will have to wait some additional time to obtain merits discovery, no other litigation
 2 in this Court will occur in the case at that time, and the government will continue to retain
 3 Figueroa's seized property, resulting in no prejudice whatsoever to the government.

4 Also weighing heavily for interlocutory appeal here is another consideration: an
 5 exceptional circumstance appears under § 1292 " 'where prohibiting review would force an
 6 appellant to lose an important right' or where 'an appellant will effectively be denied review if
 7 the proceeding progresses to its natural end.' " *Scoggin v. Weinman (In re Adam Aircraft
 8 Industries, Inc.)*, 2010 WL 717841, at *2 (D. Colo. Feb. 23, 2010) (emphases added.) This
 9 appears to be well established:

10 ... interlocutory review is reserved for those issues that present exceptional
 11 circumstances. []. Exceptional circumstances that warrant interlocutory review
include cases where prohibiting review would force an appellant to irrevocably
lose an important right, and cases where an appellant will effectively be denied
 12 review if the proceeding progresses to its natural end. []

13 *United Phosphorus Ltd. v. Fox (In re Fox)*, 241 B.R. 224, 233 (B.A.P. 10th Cir. 1999).

14 Here, prohibiting interlocutory review would force Figueroa to lose an important right –
 15 to be free from government overreach and unnecessary expense and, instead, be forced to
 16 participate in one-sided discovery while unable to raise the legitimate interests he may also have
 17 in challenging the government's seizure and attempted forfeiture of his property.

18 Moreover, Figueroa will effectively be denied review if the proceeding progresses to its
 19 natural end because he will have provided further responses and mooted the issue if this Court
 20 declines interlocutory review. Said another way, if this Court declines interlocutory review of
 21 this issue, the only way Figueroa, or any claimant, could ever obtain review of the issue and
 22 avoid the government from attempting to use this Court's order as a weapon in every other
 23 forfeiture case in this circuit (and probably elsewhere) is by refusing to comply with a court
 24 order and risking losing the forfeiture case in the District Court.

25 **A. This Court's Order Compelling Discovery Involves Question To Which
 26 There Is Substantial Ground For Difference Of Opinion**

27 There can be no serious conclusion but that there is substantial ground for Figueroa's
 28

1 view on this issue. Indeed, the Eight Circuit recently decided this issue in favor of Figueroa's
 2 position here:

3 The next issue is whether Marcus sufficiently claimed an ownership interest in the
 4 remaining \$4,500 Marcus claimed he earned through his employment. The district
 5 court struck Marcus's Amended Verified Claim as to this amount, concluding
 6 Marcus failed to satisfy the requirements of Supplemental Rule G(6).

7 ... "The purpose of the rule is 'to permit the government to file limited
 8 interrogatories at any time after the claim is filed to gather information that bears
 9 on the claimant's standing.'" []

10 On September 21, 2012, the government served ten special interrogatories on
 11 Marcus pursuant to Supplemental Rule G(6). The interrogatories sought
 12 information regarding Marcus's relationship to the seized currency. Marcus
 13 submitted responses on November 30, 2012. However, he provided a limited
 14 response to each of the interrogatories:

15 I object to answering this interrogatory for the reason that any answer I would
 16 provide would be evidence derived from prior violations of the Fourth and
 17 Fifth Amendment to the United States Constitutions and that I claim the
 18 Fourth Amendment and Fifth Amendment exclusionary rules as a privilege
 19 against answering at this time.

20 The district court concluded Marcus's grounds for refusal were insufficient to
 21 satisfy Supplemental Rule G(6). However, in so concluding, the district court
 22 noted "Supplemental Rule G(6) plays a 'special role' in determining claim
 23 standing[.]" Further, in its brief, the government also acknowledged the role of
 24 special interrogatories, noting, "[t]he purpose of special interrogatories provided
 25 for in Supplemental Rule G(6) is to allow the government the ability to determine
 26 at the outset whether claimants have standing to contest forfeiture of the
 27 defendant property." [] In addition, during oral argument, the government's
 28 counsel conceded Marcus's standing as to the \$4,500 allegedly earned through his
 employment, stating, "I think that's enough to give him standing. I think that
 meets the statutory standing for that portion of money. Absolutely, I agree that it
 does . . . But he did have statutory standing for the \$4,500. I do agree with that."

Therefore, it is unclear why the district court struck the claim as to the \$4,500
 Marcus claimed to have earned "through his employment." Such a claim appears
 sufficient to state a colorable "ownership interest" as required by 18 U.S.C. §
 983(d)(6)(A), as Marcus would certainly have an ownership interest in earned
 income. If Marcus had already established standing as to the \$4,500, as the
 government concedes, then special interrogatories were unnecessary to
determine his standing as to that currency. Thus, the district court abused its
discretion in striking Marcus's Amended Verified Claim as to the \$4,500 for
failure to adequately respond to the special interrogatories when no special
interrogatories were necessary to determine standing.

1 *U.S. v. \$154,853.00 in United States Currency*, 744 F.3d 559, 563-564 (8th Cir. 2014) (emphases
 2 added) (citing *U.S. v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 635 (9th Cir. 2012)). As
 3 noted, Rule G(6)(b) expressly allows a claimant to respond with only objections.

4 This Court (also citing *\$133,420.00*) stated exactly contrarily: “[b]y the Court's reading
 5 of the Supplemental Rules and applicable precedent, [Figueroa having established standing with
 6 his verified claim] does not relieve Figueroa of the obligation to respond to special
 7 interrogatories.” Doc. 87 at 21.

8 Notably, and with all due respect, the precedent cited by this Court for the contrary view
 9 is inapposite dicta. First, *\$133,420.00*'s language that the claimant there was required to provide
 10 further responses to the special interrogatories, aside from being dicta, was firmly and explicitly
 11 grounded in the fact that that claimant had not established standing in his verified claim because
 12 he did not claim ownership in his verified claim:

13 [A] claimant seeking to establish standing on the basis of a possessory interest
 14 must explain the circumstances of that possession. []. Here, Louis did not
 15 unequivocally claim an ownership interest in the currency until he responded to
 16 the interrogatories. Until then, Louis had left open the possibility that he was
 17 claiming only a possessory interest in the defendant property. Thus, information
 18 as to the circumstances under which the currency was obtained is information that
 19 "bears on [Louis's] standing." []

20 672 F. 3d 629, 643 (emphasis added) (citation omitted). A later panel of this Ninth Circuit,
 21 explicitly noted that distinction and hammered it home. *See \$999,830.00 (Simard - Claimant)*,
 22 704 F. 3d 1042 (9th Cir. 2012). Thus, this Court, as the district court in *\$999,830.00* did, simply
 23 “erred … by applying the standard of proof for a claimant asserting a possessory, rather than an
 24 ownership, interest in property.” 704 F. 3d 1042, at 1043.

25 In fact, it is unclear if this Court is actually convinced that it should not reconsider its
 26 view, since this Court declined to reconsider its Order compelling discovery only because the
 27 limited permissible bases for reconsideration in this Court's local rule had not been met. See
 28 Doc. 87 at 21 (“disagreement with the Court's orders is not a basis for reconsideration. See Civ.
 L.R. 7-9(b)- (c).” Figueroa believes that legal error is a valid basis for this Court to reconsider a
 prior order, but if this Court feels constrained by the local rule, then interlocutory appeal is all
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the more appropriate.

III. CONCLUSION

For the foregoing reasons, Figueroa respectfully requests that this Court certify this case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on the sole issue of whether Figueroa, having already established standing, must provide further responses to the government's Rule G(6) special interrogatories.

Respectfully Submitted,

Dated: 19 December 2014

s/*David M. Michael*
s/*Edward M. Burch*
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Attorneys for Claimant Julio Figueiroa

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that, on 21 December 2014, I caused to be electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

*s/*David M. Michael